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LETTER DATED 27 APRIL 1993 FROM THE SECRETARY-GENERAL ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

In accordance with paragraph 2 of Article 41 of the Statute of the Court and Article 77 of the Rules of Court, I have the honour to transmit herewith the official text, in English and French, of the Order of the International Court of Justice, made on 8 April 1993 pursuant to Article 41 of the Statute of the Court, indicating provisional measures in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)). The above-mentioned text has just been received by pouch from the Registrar of the Court.

(Signed) Boutros BOUTROS-GHALI

Annex

[Original: English/French]

INTERNATIONAL COURT OF JUSTICE

YEAR 1993

1993
8 April
General List
No. 91

8 April 1993

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. YUGOSLAVIA (SERBIA AND MONTENEGRO))

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* Sir Robert JENNINGS; *Vice-President* ODA; *Judges* AGO, SCHWEBEL, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA, AJIBOLA; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 35, 36, 41 and 48 of the Statute of the Court, and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application by the Republic of Bosnia and Herzegovina (hereinafter called "Bosnia-Herzegovina") filed in the Registry of the Court on 20 March 1993, instituting proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereinafter called "Yugoslavia") in respect of a dispute concerning

alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter called "the Genocide Convention"), as well as matters which Bosnia-Herzegovina maintains to be connected therewith,

Makes the following Order:

1. Whereas in the above-mentioned Application Bosnia-Herzegovina, basing the jurisdiction of the Court on Article IX of the Genocide Convention, recounts a series of events in Bosnia-Herzegovina from April 1992 up to the present day which, in its contention, amount to acts of genocide within the definition given in the Genocide Convention, specifically

(i) killing members of a group, namely Muslim inhabitants of Bosnia-Herzegovina;

(ii) causing serious bodily or mental harm to members of that group;

(iii) deliberately inflicting on that group conditions of life calculated to bring about its physical destruction in whole or in part; and

(iv) imposing measures intended to prevent births within that group;

and whereas Bosnia-Herzegovina claims that the acts complained of have been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from Yugoslavia; and whereas Bosnia-Herzegovina claims that Yugoslavia is therefore fully responsible under international law for their activities;

2. Whereas on the basis of the facts alleged in the Application Bosnia-Herzegovina requests the Court to adjudge and declare as follows:

"(*a*) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the people and State of Bosnia and Herzegovina under Articles I, II(*a*), II(*b*), II(*c*), II(*d*), III(*a*), III(*b*), III(*c*), III(*d*), III(*e*), IV, and V of the Genocide Convention;

(*b*) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the people and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1(3), 55 and 56 of the United Nations Charter;

(f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2(1), 2(2), 2(3), 2(4), and 33(1), of the United Nations Charter;

(g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

(h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

- armed attacks against Bosnia and Herzegovina by air and land;

- aerial trespass into Bosnian airspace;

- efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(*j*) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2(4) of the United Nations Charter, as well as its obligations under general and customary international law;

(*k*) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(*l*) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment supplies, troops, etc.);

(*m*) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(*n*) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(*o*) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24(1) and 51 of the United Nations Charter and in accordance with the customary doctrine of *ultra vires*;

(*p*) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina - at its request - including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);

(*q*) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

- from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;

- from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;

- from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

- from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

- from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

- from the starvation of the civilian population in Bosnia and Herzegovina;

- from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;

- from all use of force - whether direct or indirect, overt or covert - against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;

- from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;

- from all support of any kind - including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support - to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

(*r*) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)";

3. Whereas by a request filed in the Registry on 20 March 1993 immediately after the filing of the Application, Bosnia-Herzegovina, invoking Article 41 of the Statute of the Court and Articles 73, 74, 75 and 78 of the Rules of Court, and relying on the facts set forth in the Application, urgently requested that the Court indicate the following provisional measures to be in effect while the Court is seised of this case:

"1. That Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the people and State of Bosnia and Herzegovina, including but not limited to murder; summary executions; torture; rape; mayhem; so-called 'ethnic cleansing'; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, or harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or otherwise.

2. That Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support - including training, weapons, arms, ammunition, supplies, assistance, finances, direction or any other form of support - to any nation, group, organization, movement, militia or individual engaged in or planning to engage in military or paramilitary activities in or against the people, State and Government of Bosnia and Herzegovina.

3. That Yugoslavia (Serbia and Montenegro) itself must immediately cease and desist from any and all types of military or paramilitary activities by its own officials, agents, surrogates, or forces in or against the people, State and Government of Bosnia and Herzegovina, and from any other use or threat of force in its relations with Bosnia and Herzegovina.

4. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment, and supplies.

5. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to request the immediate assistance of any State to come to its defence, including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.).

6. That under the current circumstances, any State has the right to come to the immediate defence of Bosnia and Herzegovina - at its request - including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, and airpeople, etc.)";

4. Whereas on 20 March 1993, the day on which the Application and the request for the indication of provisional measures were received in the Registry, the Registrar notified the Government of Yugoslavia of the filing of the Application and the request, and communicated the text thereof to it, by telefax, and sent certified copies of the Application and the request to it by express registered post on 22 March 1993, in accordance with Article 40, paragraph 2, of the Statute and Articles 38, paragraph 4, and 73, paragraph 2, of the Rules of Court;

5. Whereas, pending the notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual text of the Application to the Members of the United Nations and other States entitled to appear before the Court, the Registrar on 25 March 1993 informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

6. Whereas on 25 March 1993, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary (ST/LEG/SER.E/10 and supplements to date) appeared to be parties to the Genocide Convention, and in addition addressed to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute of the Court;

7. Whereas on 25 March 1993 the Registrar informed the Parties that the Court would hold public sittings on 1 and 2 April 1993 to hear the observations of the Parties on the request for the indication of provisional measures; whereas on 29 March 1993 Yugoslavia requested the postponement of those sittings to a date in early May 1993, but the Court decided on 30 March 1993 that, in view of the urgency attaching under Article 74 of the Rules of Court to a request for provisional measures, it was unable to accede to that request;

8. Whereas on 31 March 1993, the Agent of Bosnia-Herzegovina filed in the Registry of the Court a document dated 8 June 1992 which in the contention of Bosnia-Herzegovina constituted a basis for the jurisdiction of the Court additional to that specified in the Application;

9. Whereas in written observations, submitted to the Court on 1 April 1993, on the request for the indication of provisional measures, the Government of Yugoslavia

"recommends that the Court, pursuant to Article 41 of its Statute and Article 73 of its Rules of Procedure, order the application of provisional measures, in particular:

- to instruct the authorities controlled by A. Izetbegovic to comply strictly with the latest agreement on a cease-fire in the 'Republic of Bosnia and Herzegovina' which went into force on 28 March 1993;

- to direct the authorities under the control of A. Izetbegovic to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof, since the genocide of Serbs living in the 'Republic of Bosnia and Herzegovina' is being carried out by the commission of very serious war crimes which are in violation of the obligation not to infringe upon the essential human rights;

- to instruct the authorities loyal to A. Izetbegovic to close immediately and disband all prisons and detention camps in the 'Republic of Bosnia and Herzegovina' in which the Serbs are being detained because of their ethnic origin and subjected to acts of torture, thus presenting a real danger for their life and health;

- to direct the authorities controlled by A. Izetbegovic to allow, without delay, the Serb residents to leave safely Tuzla, Zenica, Sarajevo and other places in the 'Republic of Bosnia and Herzegovina', where they have been subject to harassment and physical and mental abuse, and having in mind that they may suffer the same fate as the Serbs in eastern Bosnia, which was the site of the killing and massacres of a few thousand Serb civilians;

- to instruct the authorities loyal to A. Izetbegovic to cease immediately any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and to release and stop further mistreatment of all Orthodox priests being in prison;

- to direct the authorities under the control of A. Izetbegovic to put an end to all acts of discrimination based on nationality or religion and the practice of 'ethnic cleansing', including the discrimination relating to the delivery of humanitarian aid, against the Serb population in the 'Republic of Bosnia and Herzegovina'";

10. Having heard the oral observations on the request for provisional measures presented at public hearings held on 1 and 2 April 1993 by the following representatives:

on behalf of Bosnia-Herzegovina:

H.E. Mr. Muhamed Sacirbey and
Mr. Francis A. Boyle, *Agents*;

on behalf of Yugoslavia:

Mr. Ljubinko Zivkovic and
Mr. Shabtai Rosenne, *Acting Agents*;

and having received the replies of the Parties to a question put by a Member of the Court at the hearings;

11. Having regard to the "Supplementary Submission" on the facts alleged in support of the Application and the request transmitted to the Court on 1 April 1993 by facsimile by the Agent of Bosnia-Herzegovina;

* *

12. Whereas in the written observations referred to in paragraph 9 above, Yugoslavia made what it termed "a preliminary objection with regard to the legitimacy of the Applicant", claiming that neither the President of the Republic of Bosnia and Herzegovina, Mr. A. Izetbegovic, who appointed the Agents of that State and authorized the institution of the present proceedings, nor the Government of the Republic of Bosnia and Herzegovina, are legally elected; whereas Yugoslavia claims that the legitimacy and mandate of the Government and the President of the Republic of Bosnia and Herzegovina are disputed not only by representatives of the Serb people but also by representatives of the Croat people, and furthermore that the mandate of Mr. Izetbegovic expired on 20 December 1992, and was challenged on this ground by the Prime Minister of Bosnia-Herzegovina in a letter to the Chairman of the European Affairs Subcommittee of the United States Senate Foreign Relations Committee dated 24 February 1993, circulated, at the request of the Prime Minister of Bosnia-Herzegovina, by the Secretary-General of the United Nations as a document of the General Assembly and of the Security Council;

13. Whereas the Agent of Bosnia-Herzegovina stated that President Izetbegovic is recognized by the United Nations as the legitimate Head of State of the Republic of Bosnia and Herzegovina; whereas the Court has been seised of the case on the authority of a Head of State, treated as such in the United Nations; whereas the power of a Head of State to act on behalf of the State in its international relations is universally recognized, and reflected in, for example, Article 7, paragraph 2(a), of the Vienna Convention on the Law of Treaties; whereas accordingly the Court may, for the purposes of the present proceedings on a request for provisional measures, accept the seisin as the act of that State;

*

14. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established; whereas this consideration embraces jurisdiction both *ratione personae* and *ratione materiae*, even though, inasmuch as almost all States are today parties to the Statute of the Court, it is in general only the latter which requires to be considered;

15. Whereas Article 35, paragraph 1, of the Statute of the Court provides that "The Court shall be open to the States parties to the present Statute", and Article 93, paragraph 1, of the United Nations Charter that "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice"; and whereas it is maintained in the Application that "As Members of the United Nations Organization, the Republic of Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro) are parties to the Statute"; whereas however in the Application Bosnia-Herzegovina indicates that the "continuity" of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, "has been vigorously contested by the entire international community, and [sic] including by the United Nations Security Council ... as well as by the General Assembly", and reference is there made to *(inter alia)* Security Council resolution 777 (1992) and General Assembly resolution 47/1;

16. Whereas Security Council resolution 777 (1992) of 19 September 1992 reads, so far as pertinent:

"The Security Council,

.....

Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations ; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

..."

and whereas on 22 September 1992 the General Assembly adopted resolution 47/1, which reads, so far as pertinent:

"*The General Assembly,*

.....

Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly";

17. Whereas the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter on 29 September 1992 to the Permanent Representatives to the United Nations of Bosnia-Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the political consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

"While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia". Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1";

18. Whereas, while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings;

19. Whereas Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

> "2. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court";

whereas the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. "Wimbledon", P.C.I.J. 1923, Series A, No. 1*, p. 6); whereas a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention, relied on by Bosnia-Herzegovina in the present case could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court;

*

20. Whereas the Court must therefore now consider its jurisdiction *ratione materiae*; whereas Article IX of the Genocide Convention, upon which Bosnia-Herzegovina in its Application claims to found the jurisdiction of the Court, provides that

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute";

21. Whereas the former Socialist Federal Republic of Yugoslavia signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; whereas both Parties to the present case correspond to parts of the territory of the former Socialist Federal Republic of Yugoslavia;

22. Whereas at the time of the proclamation of the Federal Republic of Yugoslavia (that is to say the Respondent in the present proceedings) on 27 April 1992, a formal declaration was adopted on its behalf to the effect that

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally";

and whereas this intention of Yugoslavia to honour the international treaties of the former Yugoslavia was confirmed in an official Note from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General, dated 27 April 1992;

23. Whereas Bosnia-Herzegovina on 29 December 1992 transmitted to the Secretary-General of the United Nations, the depositary of the Genocide Convention, a Notice of Succession in the following terms:

> "the Government of the Republic of Bosnia and Herzegovina, having considered the Convention on the Prevention and Punishment of the Crime of Genocide, of December 9, 1948, to which the former Socialist Federal Republic of Yugoslavia was a party, wishes to succeed to the same and undertakes faithfully to perform and carry out all the stipulations therein contained with effect from March 6, 1992, the date on which the Republic of Bosnia and Herzegovina became independent";

and whereas the Secretary-General on 18 March 1993 communicated the following Depositary Notification to the parties to the Genocide Convention:

> "On 29 December 1992, the notification of succession by the Government of Bosnia and Herzegovina to the above-mentioned Convention was deposited with the Secretary-General, with effect from 6 March 1992, the date on which Bosnia and Herzegovina assumed responsibility for its international relations";

24. Whereas Yugoslavia has disputed the validity and effect of the Notice of 29 December 1992, contending that no rule of general international law gives Bosnia-Herzegovina the right to proclaim unilaterally that it is now a party to the Genocide Convention merely because the former Socialist Federal Republic of Yugoslavia was a party to the Convention and the Convention was thus applicable to what is now the territory of Bosnia-Herzegovina, that the "declaration of succession" procedure provided for in the Vienna Convention on Succession of States in respect of Treaties (which Convention is not in force) was evolved for, and is applicable only in, cases of decolonization, and is therefore not open to Bosnia-Herzegovina; and that the Notice of 29 December 1992, if construed as an instrument of accession under Article XI of the Genocide Convention, can only "become effective on the ninetieth day following the deposit of the instrument" in accordance with Article XIII of the Convention; whereas Yugoslavia concludes that the Court has jurisdiction under the Genocide Convention, if at all, only in respect of facts subsequent to the expiration of 90 days from the Notice of 29 December 1992;

25. Whereas the Court observes that the Secretary-General has treated Bosnia-Herzegovina, not as acceding, but as succeeding to the Genocide Convention, and if this be so the question of the application of Articles XI and XIII of the Convention would not arise; whereas however the Court notes that even if Bosnia-Herzegovina were to be treated as having acceded to the Genocide Convention, with the result that the Application might be said to be premature when filed, "this circumstance would now be covered" by the fact that the 90-day period elapsed between the filing of the Application and the oral proceedings on the request (cf. *Mavrommatis Palestine Concessions, Judgment No. 2, P.C.I.J., Series A, No. 2*, p. 34); whereas the Court, in deciding whether to indicate provisional measures is concerned, not so much with the past as with the present and with the future; whereas, accordingly even if its jurisdiction suffers from the temporal limitation asserted by Yugoslavia - which it does not now have to decide - this is not necessarily a bar to the exercise of its powers under Article 41 of the Statute;

26. Whereas Article IX of the Genocide Convention, to which both Bosnia-Herzegovina and Yugoslavia are parties, thus appears to the Court to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III" of the Convention;

*

27. Whereas on 31 March 1993 the Agent of Bosnia-Herzegovina submitted, as constituting an additional basis of jurisdiction of the Court in this case, a letter, dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by Mr. Momir Bulatovic, President of the Republic of Montenegro, and Mr. Slobodan Milosevic, President of the Republic of Serbia; whereas the Court considers that the fact that this letter was not invoked in the Application as a basis of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the further course of the proceedings (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, pp. 426-427, para. 80);

28. Whereas the letter of 8 June 1992 referred to a letter which the President of the Arbitration Commission had on 3 June 1992 addressed to the Presidents of the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and to the Presidency of the Federal Republic of Yugoslavia, requesting a statement of the position of their respective countries on three questions raised by the Chairman of the Conference for Peace in Yugoslavia; whereas the first question was whether the Federal Republic of Yugoslavia was a new State calling for recognition by the Member States of the European Community, the second question was whether the dissolution of the former Socialist Federal Republic of Yugoslavia could be regarded as complete, and the third was:

> "If this is the case, on what basis and by what means should the problems of the succession of States arising between the different States emerging from the Socialist Federal Republic of Yugoslavia be settled?"

29. Whereas in the joint letter of 8 June 1992, the President of Montenegro and the President of Serbia challenged the Commission's competence to give an opinion on the three questions submitted to it, and went on to say, in the English translation supplied by Bosnia-Herzegovina from the original Serbo-Croat:

"2. It is the principled position of FR Yugoslavia that all questions involved in the overall settlement of the Yugoslavian crisis should be resolved in an agreement between FR Yugoslavia and all the former Yugoslavian republics.

3. FR Yugoslavia holds the view that all legal disputes which cannot be settled by agreement between FR Yugoslavia and the former Yugoslav republics should be taken to the International Court of Justice, as the principal judicial organ of the United Nations.

Accordingly, and in view of the fact that all the issues raised in your letter are of a legal nature, FR Yugoslavia proposes that in the event that agreement is not reached among the participants in the Conference, these questions should be adjudicated by the International Court of Justice, in accordance with its Statute";

30. Whereas Bosnia-Herzegovina interprets this text as an offer by the Federal Republic of Yugoslavia to submit all outstanding legal disputes between itself and Bosnia-Herzegovina to the Court, and in reliance on this offer the Agent of Bosnia-Herzegovina at the hearings stated that Bosnia-Herzegovina

"hereby submits to the Court all of the legal disputes between it and ... Yugoslavia that have been set forth in our Application [and] Request for provisional measures",

and submitted

"that this formal expression of intention to submit to the jurisdiction of this Court by the appropriate authorities ... provides an additional jurisdiction for the Court to decide all the outstanding legal disputes between us";

and requested the Court "to consider this additional jurisdictional basis ... in support of [the] request for an indication of provisional measures";

31. Whereas however at the present stage of the proceedings, and on the basis of the information before the Court, it is by no means clear to the Court whether the letter of 8 June 1992 was intended as an "immediate commitment" by the two Presidents, binding on Yugoslavia, to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes (cf. *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 44, para. 108); or whether it was intended as a commitment solely to submission to the Court of the three questions raised by the Chairman of the Committee; or as no more than the enunciation of a general policy of favouring judicial settlement, which did not embody an offer or commitment;

32. Whereas the Court is thus unable to regard the letter of 8 June 1992 as constituting a prima facie basis of jurisdiction in the present case and must proceed therefore on the basis only that it has prima facie jurisdiction, both *ratione personae* and *ratione materiae*, under Article IX of the Genocide Convention;

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33. Whereas Yugoslavia has drawn attention to the numerous resolutions adopted by the United Nations Security Council concerning the situation in the former Yugoslavia, and to the fact that in that respect the Security Council has taken decisions on the basis of Article 25 of the Charter, and has indicated expressly that it is acting under Chapter VII of the Charter; whereas Yugoslavia contends that so long as the Security Council is acting in accordance with Article 25 and under that Chapter, "it would be premature and inappropriate for the Court to indicate provisional measures, and certainly provisional measures of the type which have been requested"; whereas the Court understands this objection as being primarily addressed to those measures requested by Bosnia-Herzegovina which go beyond matters within the scope of the Genocide Convention, and which for that reason the Court cannot consider; whereas however in any event, as the Court has observed in a previous case, while there is in the Charter

> "a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95);

*

34. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent;

35. Whereas the Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; whereas accordingly the Court will confine its examination of the measures requested, and of the grounds asserted for the request for such measures, to those which fall within the scope of the Genocide Convention;

* *

36. Whereas the legal rights sought to be protected by the indication of provisional measures are enumerated in the request of Bosnia-Herzegovina for the indication of such measures as follows:

"(*a*) the right of the citizens of Bosnia and Herzegovina physically to survive as a People and as a State;

(*b*) the rights of the People of Bosnia and Herzegovina to life, liberty, and security, as well as the other basic human rights specified in the 1948 Universal Declaration of Human Rights;

(*c*) the right of the People and State of Bosnia and Herzegovina to be free at all times from acts of genocide and other genocidal acts perpetrated upon them by Yugoslavia (Serbia and Montenegro), acting together with its agents and surrogates in Bosnia and elsewhere;

(*d*) the right of the People and State of Bosnia and Herzegovina to be free at all times from the use or threat of force against them by a foreign State acting in conjunction with its agents and surrogates on their sovereign territory and elsewhere;

(e) the right of Bosnia and Herzegovina to conduct its affairs and to determine matters within its domestic jurisdiction without interference or intervention by any foreign State acting directly or by means of agents and surrogates, or both;

(f) the right of self-determination of the People of Bosnia and Herzegovina;

(g) the basic right of sovereign existence for the People and State of Bosnia and Herzegovina";

37. Whereas Yugoslavia similarly seeks the protection of certain rights by the provisional measures recommended by it, set out in paragraph 9 above;

38. Whereas however, with respect to the measures requested both by Bosnia-Herzegovina and by Yugoslavia, the Court is, as observed above, confined to the consideration of such rights under the Genocide Convention as might form the subject-matter of a judgment of the Court in the exercise of its jurisdiction under Article IX of that Convention;

39. Whereas the definition of genocide in Article II of the Genocide Convention reads, so far as relevant:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

...";

40. Whereas the Applicant has brought before the Court, in the Statement of Facts in its Application, and in the subsequent document entitled "Supplementary Submission", accounts of military and paramilitary activities, including the bombing and shelling of towns and villages, the destruction of houses and forced migration of

civilians, and of acts of violence, including execution, murder, torture, and rape which, in the circumstances in which they have occurred, show, in the view of the Applicant, that acts of genocide have been committed, and will continue to be committed against, in particular, the Muslim inhabitants of Bosnia-Herzegovina;

41. Whereas Bosnia-Herzegovina claims in the Application that the acts there complained of have been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from Yugoslavia, and that Yugoslavia is therefore fully responsible under international law for their activities; and whereas in its request for the indication of provisional measures Bosnia-Herzegovina similarly contends that the facts stated in the Application show that Yugoslavia is committing acts of genocide, both directly and by means of its agents and surrogates, and that there is no reason to believe that Yugoslavia will voluntarily desist from this course of conduct while the case is pending before the Court;

42. Whereas Yugoslavia observes that the situation is not one of aggression by one State against another, but a civil war, and asserts that it has no soldiers in the territory of Bosnia-Herzegovina, that it does not militarily support any side in the conflict, and that it does not support or abet in any way the commission of crimes cited in the Application; that Yugoslavia and its subordinate bodies, including the military, have not committed and are not committing any of the acts to which Article III of the Genocide Convention refers; and that the claims presented in the Application are without foundation; and whereas Yugoslavia has also argued that what Bosnia-Herzegovina is seeking is an interim judgment on the merits of the case, which is not covered by Article 41 of the Statute (cf. *Factory at Chorzów (Indemnities), Order of 21 November 1927, P.C.I.J., Series A, No. 12*, p. 10);

43. Whereas Yugoslavia in its written observations on the request for the indication of provisional measures "requests the Court to establish the responsibility of the authorities" of Bosnia-Herzegovina for acts of genocide against the Serb people in Bosnia-Herzegovina, and indicates its intention to submit evidence to that effect; and whereas Yugoslavia claimed at the hearings that genocide and genocidal acts are being carried out against Serbs living in Bosnia-Herzegovina; whereas Bosnia-Herzegovina for its part contends however that there is no basis in fact or in law for the indication of provisional measures against it, there being no credible evidence that its Government has committed acts of genocide against anyone;

44. Whereas the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact or of imputability, and the

right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision;

45. Whereas Article I of the Genocide Convention provides that:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish";

whereas all parties to the Convention have thus undertaken "to prevent and to punish" the crime of genocide; whereas in the view of the Court, in the circumstances brought to its attention and outlined above in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future;

46. Whereas the Court is not called upon, for the purpose of its decision on the present request for the indication of provisional measures, now to establish the existence of breaches of the Genocide Convention by either Party, but to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of rights under the Genocide Convention; and whereas the Court is satisfied, taking into account the obligation imposed by Article I of the Genocide Convention, that the indication of measures is required for the protection of such rights; and whereas Article 75, paragraph 2, of the Rules of Court recognizes the power of the Court, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request;

*

47. Whereas Bosnia-Herzegovina also invokes Article VIII of the Genocide Convention, which provides that

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III",

and Bosnia-Herzegovina calls upon the Court to "act immediately and effectively to do whatever it can to prevent and suppress" the acts of genocide complained of or threatened; whereas the Court considers Article VIII, even assuming it to be applicable to the Court as one of the "competent organs of the United Nations", appears not to confer on it any functions or competence additional to those provided for in its Statute; whereas accordingly the Court at this stage of the proceedings is not required to do more than consider what provisional measures may be called for under Article 41 of the Statute;

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48. Whereas in its request for the indication of provisional measures Bosnia-Herzegovina has also maintained that the Court should exercise its power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require; whereas from the information available to the Court it is satisfied that there is a grave risk of action being taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution;

* *

49. Whereas the crime of genocide "shocks the conscience of mankind, results in great losses to humanity ... and is contrary to moral law and to the spirit and aims of the United Nations", in the words of General Assembly resolution 96 (I) of 11 December 1946 on "the Crime of Genocide", which the Court recalled in its Advisory Opinion on *Reservations on the Convention on Genocide* (*I.C.J. Reports 1951*, p. 23);

* *

50. Whereas in the light of the several considerations set out above, the Court finds that the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court;

51. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of those questions;

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* *

52. For these reasons,

The COURT,

Indicates, pending its final decision in the proceedings instituted on 20 March 1993 by the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro), the following provisional measures:

A. (1) Unanimously,

> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2) By 13 votes to 1,

> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

IN FAVOUR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola;

AGAINST: *Judge* Tarassov;

B. Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of April, one thousand nine hundred and ninety-three, in four copies, one of which will be placed in the archives of the Court and the others transmitted respectively to the Government of the Republic of Bosnia and Herzegovina, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and to the Secretary-General of the United Nations for transmission to the Security Council.

(Signed) R. Y. JENNINGS,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge Tarassov appends a declaration to the Order of the Court.

(Initialled) R. Y. J.

(Initialled) E. V. O.

Enclosure

DECLARATION OF JUDGE TARASSOV

The appalling atrocities which have taken place in the territory of the former State of Yugoslavia move me no less than they move my colleagues. Nevertheless I have not been able to join with them in voting for all the operative paragraphs of the Order, and I wish to say why.

I am generally in agreement with the considerands and conclusions of the Order, including its exclusion of the many elements of the request for provisional measures which go far beyond the limited jurisdiction of the Court under Article IX of the Genocide Convention. I support the provisional measures indicated by the Court in paragraph 52 A (1) and paragraph 52 B. I agree that the Government of the Federal Republic of Yugoslavia "should immediately ... take all measures within its power to prevent commission of the crime of genocide" - meaning, of course, measures within its real power. In my opinion, the same measures should be taken under the same understanding in respect of the Government of the Republic of Bosnia and Herzegovina, which has responsibility over acts committed on its territory. Unfortunately, the Court did not find it necessary to so provide. I agree that the Government of the Federal Republic of Yugoslavia and the Government of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of genocide or render it more difficult of solution. Accordingly I have voted for these operative paragraphs of the Order.

However, I regret that I have not been able to vote for the provision of paragraph 52 A (2) that the Government of the Federal Republic of Yugoslavia should in particular "ensure" that any military, paramilitary or irregular armed units which "may" be directed or supported by it, and organizations or persons which "may be subject to its control, direction or influence" do not commit any acts of genocide, "of conspiracy to commit genocide", of incitement to genocide or of "complicity in genocide". In my view, these passages of the Order are open to the interpretation that the Court believes that the Government of the Federal Republic of Yugoslavia is indeed involved in such genocidal acts, or at least that it may very well be so involved. Thus, on my view, these provisions are very close to a pre-judgment of the merits, despite the Court's recognition that, in an Order indicating provisional measures, it is not entitled to reach determinations of fact or law. Moreover, these passages impose practically unlimited, ill-defined and vague requirements for the exercise of responsibility by the Respondent in fulfilment of the Order of the Court, and lay the Respondent open to unjustifiable blame for failing to comply with this interim measure. The lack of balance in these provisions is the clearer in view of the way in which the Court has singled out one element of the population of Bosnia and Herzegovina. The Applicant when referring to the measures that it sought (paragraph 3 of the Order) and the legal rights that it sought to have protected (paragraph 36 of the Order) did not specify a particular group for protection, but rather and quite properly used such terms as "the citizens" or "the People" of Bosnia and Herzegovina.

Moreover, these objectionable provisions lack not only balance but practicality. Is it really within the realm of the practical for the Yugoslav Government to "ensure" that all persons who may claim to be subject to its influence do not conspire to commit genocide or incite genocide? Particularly when the persons who are accused of such acts are not its citizens and not within its territorial jurisdiction? Someone may affirm that he is under the influence of the Yugoslav Government without that being the fact. I am convinced that the Court should not imply that the Yugoslav Government may have responsibility for the commission of acts which in fact may be beyond its control.

(Signed) Nikolai K. TARASSOV.